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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

LUXEMBOURG

DRAFT OPINION
ON
THE PROPOSED REVISION OF THE CONSTITUTION

on the basis of comments by:

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Introduction

1. On 12 July 2018, Mr Mars di Bartolomeo, President of the Chamber of Deputies of the Grand Duchy of Luxembourg, sent the text of the proposed revision introducing a new Constitution (CDL-REF(2019)001) to the Venice Commission for opinion.

2. Ms Bazy-Malaurie, Ms Cartabia, Mr Holmøyvik, Mr Mathieu, Ms Šimačkova and Mr Velaers were appointed as rapporteurs for the Venice Commission.

3. On 15 February 2019, a delegation from the Venice Commission consisting of Ms Bazy-Malaurie, Ms Cartabia, Mr Holmøyvik, Mr Mathieu and Ms Šimačkova, accompanied by Ms Granata-Menghini, Deputy Secretary of the Commission, and Mr Garrone, Head of Division, travelled to Luxembourg and met the Commission on Institutions and Constitutional Review, the Minister of Justice, the Council of State, the judiciary, the Ombudsman and non-governmental organisations. The Venice Commission wishes to thank the Luxembourg authorities for the excellent manner in which the visit was organised.

4. The present opinion was discussed at the meeting of the Sub-Commission on Democratic Institutions (Venice, …) and was subsequently adopted by the Venice Commission at its … plenary session (Venice, …).

General remarks

5. The draft revision submitted to the Venice Commission for opinion stems from a 2009 revision proposal, which was itself the result of discussions begun in 2005, and on which most political, local, corporate and judicial authorities in Luxembourg have already commented. This draft is part of a mechanism adopted in 2003 to facilitate the constitutional review process, and which dispenses with the need to hold parliamentary elections before amending the Constitution. It is essentially an attempt to update the text and to incorporate in it a number of practices that would seem to characterise the current reform.

6. The most important issues have been put to a consultative referendum and the proposed revision has been the subject of public debate. The breadth and depth of this consultation process is to be commended. With regard to the referendum, the proposals to lower the voting age to 16, to grant non-Luxembourg residents the right to vote and to limit ministerial terms were rejected by a large majority. Further public consultations are planned on the text as adopted by the Commission on Institutions and Constitutional Review, before a referendum is held following the adoption of the text on first reading by the Chamber of Deputies.

7. The constitutional review procedure was launched with three goals in mind: to modernise terminology which is outdated in places, to tailor the text to the way powers are actually exercised and to incorporate in the Constitution provisions on customary practice which are included in other texts falling outside the ambit of the legislature. This is the context in which the proposed institutional amendments should be seen: the adaptation of a 150-year-old text to the natural evolution of the political system, institutions and legal concepts.

8. The draft Constitution is founded on two premises:[1] it has same structure as the current Constitution, and the amendments do not fundamentally change the functioning of existing institutions or their relationships.

9. Even if its practical implications do not appear to be substantial, the reform does nevertheless significantly change the nature of the Grand Duchy's political system. There has

[1] See Report by the Commission on Institutions and Constitutional Review (6.6.2018), p. 3.

been a definite weakening of the Grand Duke's already symbolic powers, through the introduction of the key features of a monist parliamentary regime.

10. It is also worth noting that, while, to a large extent, it merely translates into law earlier developments which it endorses, the current reform is considered important enough to be put to a referendum, even though such a procedure is not mandatory. The debate over whether what is being proposed is a revision or a new Constitution appears to have been settled in favour of the latter. This is in line with the tradition of some European states, such as France, which adopted new constitutions when major changes were made, or which, like Switzerland, radically altered the structure of an existing text to produce a new constitution, without greatly changing the substance. Other countries have introduced only a few constitutional amendments by interpreting an old text in an open-ended way or, like Norway, have introduced major changes through partial amendments to a now 200-year-old Constitution, combined with unwritten conventions.

11. The Luxembourg authorities have informed the Venice Commission that an explanatory report will be attached to the draft Constitution at a later stage.

12. In any event, it is for the Luxembourg constitutional writers, within the limits of the fundamental principles of the Council of Europe - democracy, human rights and the rule of law - to make the political choices that fall to them and decide whether there is to be a total revision or one or more partial revisions. This opinion is not intended to make such political choices for them, but rather to highlight points that could raise problems of interpretation or application.

Chapter 1 – The state, its territory and its inhabitants

13. This chapter brings together the key features that characterise the Luxembourg state and establishes general constitutional principles. It is in line with the practice of many European states and helps to clarify the constitutional text in general.

14. Article 3, which affirms the sovereignty of the *nation*, reflects an idea specific to liberal constitutionalism. This idea has more recently been replaced by the sovereignty of the *people* in modern democratic states. “Nation” is an indeterminate and opaque concept, whereas “people” is legally more precise, because it refers to all citizens.

15. Article 4 proclaims that the language of Luxembourg is Luxembourgish, while the law regulates the use of the Luxembourgish, French and German languages. The current Constitution does not proclaim any official language, but merely provides in Article 29 that "the law shall regulate the use of languages in administrative and judicial matters". Although widely used, especially in speech, Luxembourgish is not systematically employed as an administrative language; it will be noted, for example, that the draft constitutional amendments are currently available only in French. The normative effect of designating Luxembourgish as the language of Luxembourg is open to debate. According to information provided by the Luxembourg authorities, this provision is essentially symbolic in nature. As for the reference to the law, it is not indicated whether it refers only to dealings with public authorities, and whether it rules out the use of languages other than the three mentioned. Establishing the main elements of the language regime in the Constitution would help to avoid any ambiguity.

16. Article 5 introduces a "European clause" like the one found in other European constitutions. This article, however, does not provide for *limitations* on transfers of powers, whereas in some states, certain limits are prescribed: constitutional identity of the state, protection of fundamental rights, or the core sovereign powers of the state. Consideration could be given to imposing such limits. Also, there is no reference in the Constitution to the principle of the direct effect and primacy of European Union law in relation to national law. The

qualified majority required for any such transfer of sovereignty is defined in Article 72.4 (two thirds of the votes of the members of the Chamber of Deputies). A reference to this provision whenever the question of a qualified majority arises might be helpful.

17. Article 11, on access to employment in the public service, is in line with the case-law of the Court of Justice of the European Union, which states that only posts involving direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the state or other public authorities may be reserved for nationals to the exclusion of other EU citizens.[2] It is also in line with the European Convention on Nationality, which entered into force in respect of Luxembourg on 1 January 2018, and Article 20 § 2 of which allows an exception to the principle of equal treatment with nationals where economic and social rights are concerned. "Thereunder, a State Party may exclude non-nationals from employment in the public service only where the employment involves the exercise of sovereign powers. This phrase was taken from and is based on the wording of a judgment of the European Court of Justice (Commission of the European Communities v. Kingdom of Belgium, 26 May 1982, Case 149/79) (1). This exception is limited to employment in specific activities of the public service in so far as the employment involves the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State. In those exceptional circumstances, possession of nationality is accepted as a necessary prerequisite because the area of employment is so sensitive."[3]

18. There is no general provision on the hierarchy of legal norms, it merely being stated in Article 98 that courts shall apply the laws and regulations only to the extent that they comply with higher legal norms. The Luxembourg authorities have explained that international law becomes effective immediately and takes precedence over all Luxembourg national law, including the Constitution. Since it is enshrined in Luxembourg law, it should be constitutionalised.

19. There is no such category as "organic law" in Luxembourg, although the Chamber of Deputies may adopt "resolutions" by a qualified majority of two thirds of deputies' votes whenever the Constitution so requires. This requirement does not arise very often in the draft Constitution; it applies, for example, when determining the number of deputies to be elected in each of the four electoral districts (Article 64), but not with respect to electoral legislation as such. On many points, however, the draft Constitution refers to the law, which will therefore take the form of an ordinary law even when it is concerned with structure, as, for example, in the case of the Ombudsman (Article 82), the status of judges and prosecutors (Article 100) or the National Judicial Council (Article 102). Introducing a category entitled "organic law" would be a sensible step. Alternatively, the Constitution should require adoption by a qualified majority for any law pertaining to the key elements in the organisation of public authorities, in order to make them more stable and, where appropriate, more independent.

Chapter 2 – Rights and freedoms

20. In its interim opinion, the Venice Commission expressed the view that the chapter in the Luxembourg Constitution on fundamental rights should be updated and organised in a more coherent fashion from the point of view of the rights contained therein and the clauses limiting those rights.[4]

21. The new draft is a step in this direction but still suffers from the limitations arising from the original choices made in the Luxembourg Constitution, namely a 19th century view of

[2] See for example CJEU 2 July 1996, *Commission v. Luxembourg*, C-473/93. ECR 1996, I-3248.
[3] European Convention on Nationality (ETS 166), explanatory report, § 123.
[4] CDL-AD(2009)057, paragraph 36 et seq.

fundamental rights protection. Social rights of workers, the elderly, children and people with disabilities are accorded a very low status, as are the principle of non-discrimination and the collective rights of intermediary bodies of civil society (families, associations, religious denominations, cultural and linguistic minorities, trade unions, etc.).

22. The Luxembourg authorities have informed the Commission that, since international law has immediate effect and takes precedence over all domestic law, including the Constitution, the human rights provisions have not been systematically adapted to the international treaties to which Luxembourg is a party. The Commission considers firstly that the primacy of international law should be enshrined in the Constitution since it is recognised in Luxembourg law (see paragraph 18 above); it is in any case important that the catalogue of human rights contained in the Constitution be consistent with international standards, while respecting the margin of appreciation enjoyed by individual states. Crystallising in the Constitution significant divergences from international standards as they stand at the time of the constitutional reform could be construed as a desire on the part of the constitutional legislator to deviate from international law. Besides, any discrepancy carries a risk of confusion, not least because the case-law of the Constitutional Court might differ from that of the European Court of Human Rights, which Luxembourg courts are required to apply directly (the binding force of the Constitutional Court's judgments is less certain - see below, paragraph 115).

23. Chapter 2 "Rights and freedoms" is divided into three sections that introduce a distinction between *fundamental rights, public liberties and objectives with constitutional status*.

24. The "fundamental rights" in section 1 are considered *absolute rights*, as there are no restrictions and the general limitation clause in Article 37 applies only to "public liberties". The report of the Commission on Institutions and Constitutional Review, however, states: "Article 37 introduces a "transversal clause" into the Constitution stating that... any limitation *on the exercise of fundamental rights and public liberties*...".[5] This should be clarified. Under the ECHR, an absolute right cannot be balanced against the needs of others or the general public interest. The list of absolute rights must be strict, as, in general, individual rights must be subject to limitations in order to simultaneously safeguard other legitimate rights and purposes necessary in a democratic society, in accordance with the principle of proportionality (as provided for in Article 37). The European Court limits the notion of absolute rights to Articles 3 (Prohibition of torture), 4 § 1 (Prohibition of slavery and servitude) and 7 (no punishment without law) of the Convention, as well as to Protocol No. 13 concerning the abolition of the death penalty in all circumstances, which Luxembourg has ratified.

25. There is no doubt that *human dignity* (Art. 12) and *physical and mental integrity* together with *the prohibition of torture and the death penalty* (Art. 13) must be included among the absolute rights. The prohibition of slavery and servitude could be considered implicit in the protection of human dignity, which the draft revision rightly places at the top of the list of rights and freedoms (Article 12).

26. Freedom of thought, conscience and religion (Article 14), on the other hand, is held to be absolute only in respect of its internal aspect – the forum internum. Otherwise, like respect for privacy (Article 15), it cannot be considered an absolute right; Articles 8(2) and 9(2) ECHR treat these freedoms as relative rights that may be subject to interference in order to protect the rights of others or, more broadly, the general interest. They should therefore be listed under public liberties.

[5] Report by the Commission on Institutions and Constitutional Review, p. 42.

27. The "public liberties" referred to in section 2 are to be understood as relative human rights, which can and must be balanced against the general interest. The "objectives with constitutional status" referred to in section 3, as explained in the report of the Commission on Institutions and Constitutional Review, "do not introduce an individual positive right with direct effect".[6]

28. The Venice Commission notes that the distinction between enforceable subjective rights and non-directly enforceable rights defined as state objectives has been made in other European constitutions and the Venice Commission has repeatedly encouraged states to clarify to what extent socio-economic rights and "third-generation rights" are only objective in nature or whether they also give individuals a subjective right, linked to the right to bring court proceedings. The Commission has accordingly highlighted the risk of misunderstandings about the scope and meaning of certain rights if such clarity is not provided. This distinction, moreover, ties in with the one made in the Charter of Fundamental Rights of the European Union (Article 52.5): "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

29. While a distinction between subjective rights and state objectives is possible, therefore, it must be consistent with international law.

30. It needs to be ascertained whether the list of "objectives with constitutional status" does not include subjective rights.

31. Generally speaking, the yardstick used by the constitutional legislator to organise Chapter 2 into three different sections seems less than clear. One might wonder why the principles of equality and non-discrimination have been placed in the section entitled "*public liberties*" rather than among the rights. The right of persons with disabilities not to be subjected to discrimination (Article 41) is a subjective right that is closely linked to the principles of equality and non-discrimination which feature among public liberties. The right to form a family and to respect for family life is guaranteed in Article 8 ECHR in the same way as the right to respect for private life, home and correspondence: like the latter, therefore, it should be included in section 2 under "public liberties". The reluctance of the constitutional writers to guarantee the right to form a family and the right to respect for family life (Article 38) as rights in the full sense of the term would seem to be explained by the interaction they undergo as society evolves.[7] The fact remains, however, that Articles 8 and 12 ECHR secure genuine subjective rights, and this should be reflected in the Constitution, by allowing the legislator to extend their scope and regulate their exercise. It is important to note that, in a field where "a common European ground" is lacking, the European Court of Human Rights often leaves a wide margin of appreciation to national governments, meaning that it will be for the national constitution writer or legislature to determine the scope of the right to form a family and to respect for family life.

[6] Report by the Commission on Institutions and Constitutional Review, p. 27.

[7] Page 42 of the report by the Commission on Institutions and Constitutional Review has the following to say on this subject: "Much uncertainty has been created around this concept by the emergence of various forms of artificial procreation. Does the term "family life" extend beyond the so-called "nuclear" family (parent/child) to include siblings, grandparents or homosexual couples? The European Court of Human Rights has taken an open-ended position on the matter, but one that is generally favourable to all forms of family life. The Luxembourg courts will have to draw, to a large extent, on the decisions rendered on the basis of Article 8 of the European Convention."

32. With regard to the *principle of equality*, Article 16 (1), first paragraph, of the draft, like the current Constitution, provides that "Luxembourgers shall be equal before the law".

33. Equality in and before the law is one of the criteria for the rule of law.[8] Luxembourg has ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which generally prohibits all forms of discrimination, as well as the International Covenant on Civil and Political Rights, Article 26 of which states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law". In addition, the European Court of Human Rights has held that "*very weighty reasons* would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention". [9] It is worth noting the importance of this issue in Luxembourg, where almost half of the resident population is made up of foreigners (85% of them EU nationals). A reference to the specific rights of European citizens might be appropriate in this context.

34. The prohibition of discrimination in Article 16 (2), like all the other provisions in Chapter 2, applies to both nationals and non-nationals. Article 16 (1), first paragraph, should therefore be revised so that it proclaims the principle of equality before the law in general and not as a right reserved for Luxembourgers, in accordance with international law.[10] Some clarification could be provided to the effect that the law may provide for a difference in treatment between Luxembourgers and foreigners in terms of voting rights and eligibility.[11] Otherwise, differences of treatment based on nationality remain possible in cases where they result from "an objective disparity which is rationally justified, adequate and proportionate to its purpose" (Article 16 (1), second paragraph), and subject to stricter rules arising from European Union law and international treaties.

35. Furthermore, Article 17 - which reproduces Article 111 of the current Constitution almost verbatim - states that "every foreigner on the territory shall enjoy the protection granted to persons and property, except as otherwise provided by law". This article equates to Article 1 of the first Additional Protocol to the ECHR, and the High Contracting Parties are required to secure "to everyone within their jurisdiction" the rights and freedoms defined in Title I of the Convention. It thus tempers the scope of Article 16 (1). One wonders whether this article would be necessary if Article 16 (1) stated that "everyone" is equal before the law. In the Luxembourg context, however, where foreigners make up a large share of the population, this declaration, together with Article 10, second paragraph, which allows the law to confer the exercise of political rights (voting and eligibility) on non-Luxembourgers - except in parliamentary elections which are subject to the special arrangement provided for in Article 65 (1) – (2) - could assume major symbolic significance.

36. Article 16 (2), prohibiting discrimination "on the grounds of personal status or personal circumstances", should be expanded upon. In many cases, personal status or personal circumstances are invoked and accepted as justification for differences in treatment and, where appropriate, positive measures in favour of the most vulnerable individuals and groups. For example, whether or not a person is married, has children, is in poor or good health, is in financial hardship or well off, possesses a degree or special expertise or not are all forms of

[8] Venice Commission, Rule of Law Checklist, II.D.3. and 4.
[9] ECtHR *Koua Poirrez v. France*, 40892/98, 30 September 2003, § 46; *Gaygusuz v. Austria*, 17371/90, 16 September 1996, paragraph 42.
[10] Article 26 of the International Covenant on Civil and Political Rights, to which Luxembourg is a party: "All persons are equal before the law, etc.". See, in this connection, CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania, paragraph 41; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, paragraph 45.
[11] See CDL-AD(2002)023rev2, Code of Good Practice in Electoral Matters, I.1.1.b. The draft specifically denies foreigners the right to vote or stand as a candidate in parliamentary elections (Article 65), while at the same time allowing the law to grant them such rights in other instances (Article 10.2). Luxembourg already recognises the right of foreigners, including non-EU citizens, to vote and stand as a candidate in local elections.

personal status or personal circumstances that are considered when granting rights or imposing obligations. The constitutional text should include among the impermissible grounds for discrimination at least the ones listed in Article 14 ECHR and Article 1 of Protocol 12.

37. With regard to affirmative action in favour of women, *Article 16 (3)*, second paragraph, is the same as Article 11.1 of the current Constitution. The "Commentaire" does not indicate the possible scope of this provision; that might be advisable, especially if case-law exists in this area.

38. Article 18 (2) confirms the principle of legality for any criminal prosecution, arrest or deprivation of liberty. Article 18 (3), first paragraph, contains an additional safeguard in the event of arrest: it requires a reasoned court decision to be notified within 24 hours at the latest.

39. The writers should clearly indicate which forms of deprivation of liberty are considered to constitute arrest within the meaning of Article 18 (3). Most likely they are arrests in the context of a criminal investigation. The question arises as to whether depriving juveniles of their liberty in the context of youth protection also falls within the scope of this provision.

40. The question also arises as to why a person who has been caught in the act should not enjoy the same or similar protection. While it might be acceptable for such a person to be arrested immediately at the scene by police officers, consideration could be given to requiring an arrest warrant to be issued within 24 hours or to stipulating another time-limit within which a warrant must be issued.

41. Article 19 only guarantees the right of access to the court provided for by law. This right is supplemented by the "safeguards for users of the justice system" set out in *Articles 104 to 106*. It is desirable that all national constitutional rules on the right to a fair trial within the meaning of Article 6 ECHR – i.e. Articles 19 and 104 to 106 - be brought together in the same chapter. In this case, however, they should not be subject to the general limitation clause contained in Article 37.

42. Article 23 guarantees the freedom to manifest "opinions". The word opinion is synonymous with "assessment, view, judgment, thought, impression, feeling, idea". The term "freedom of expression", generally used in modern-day constitutions and international human rights treaties, would appear to be closer to what the drafters intended, as it explicitly covers not only "opinions" but also "information", and not just the right to impart them but also the right to receive them.[12]

43. Article 9 ECHR guarantees freedom of thought, conscience and religion, which covers "*freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance*." The writers could clarify either the text of *Article 24* or the "Commentaire" accordingly. More generally, and as stated above in relation to Article 14 (paragraph 26), since, except as regards the forum internum, freedom of thought, conscience and religion is not an absolute right, all the provisions in this area should be grouped together in a single article, which should appear in the chapter on public liberties.

44. Article 25 on freedom of assembly specifies that prior authorisation is required only if the gathering is "in the open air in a place accessible to the public". Under international human

[12] See for example Article 10 ECHR: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

rights law, however, prior authorisation should not be necessary. Advance notice of a gathering (including when it is to be held in a public place in the open air) may be required to the extent that this formality is intended to enable the state to put in place necessary arrangements to facilitate freedom of assembly and protect public order and safety, as well as the rights and freedoms of third parties.

45. As indicated in the guidelines on freedom of peaceful assembly, provision ought to be made for a system of prior notification, which should not effectively be turned into a permit system. These guidelines regard as significant the fact that, in a number of jurisdictions, permit procedures have been declared unconstitutional. A permit requirement based on a legal presumption that a permit for use of a public place will be issued (unless the regulatory authorities can provide evidence to justify a denial) can serve the same purpose as advance notification, however.[13] In addition, spontaneous assemblies and "online" meetings must be possible without notification.[14]

46. The term "prior authorisation" in Article 26 does not seem clear: are we to understand by this that it is necessary to register? While registration cannot be required in order to exercise the right of association, it may be required for the purpose of acquiring legal personality. The Constitution could provide that the law shall determine the conditions to be met in order to be granted legal personality.

47. It is important that the writers clarify, at least in the preparatory work, what the "trade union freedoms" guaranteed in *Article 28* are.

48. Article 32 provides for a right of asylum independent of obligations under international law. The proposition is a very general one, however, and leaves it to the law to determine the conditions that must be met in order to be eligible for asylum. In this regard, a few principles could be introduced into the Constitution to guide the discretionary power of the legislature, in particular to ensure compliance with the 1951 Geneva Convention on the status of refugees.

49. As regards the *right to education guaranteed by Article 33*, reference is now made to freedom of education and to private education (Article 33 (3)). Otherwise, the comments made in the interim opinion still hold: "65. This provision … does not address the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions, as laid down in Article 2 of the First Protocol to the European Convention on Human Rights. 66. Although there is no international legal obligation for States to finance private education and teaching, in some member States of the Council of Europe some form of financial support is laid down in the Constitution, sometimes on an equal footing with public education and teaching. If there is any regulation under Luxembourg law or in Luxembourg practice, it could be enshrined in the Constitution, but this is not mandatory."

50. Article 36 seems to offer protection only in the event of expropriation and not for less invasive encroachments on the right of ownership. The writers of the Luxembourg Constitution should extend the protection to "peaceful enjoyment of possessions", as guaranteed under Article 1 of the first Protocol to the ECHR.[15]

[13] CDL-AD(2019)***, paragraph ... See *Forsyth County, Georgia v. The Nationalist Movement* 505 U.S. 123 (1992). See also CDL-AD(2012)006, Joint opinion on the law on mass events of the Republic of Belarus, paragraphs 70-71: "requiring permission to hold an assembly is clearly against the general presumption in favour of holding assemblies".

[14] CDL-AD(2019)***, paragraph ...

[15] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State

51. As regards *restrictions on fundamental rights* (public liberties), the draft has followed the recommendation of the Venice Commission[16] and included a cross-referencing clause establishing the general conditions for restricting the enjoyment of fundamental rights, modelled on Article 52.1 of the Charter of Fundamental Rights of the European Union. This is to be welcomed (Article 37). Clauses of this type are of crucial importance in the application of fundamental rights at the judicial level. This general clause provides for three conditions: 1. the *essence* of the right or freedom being limited must be respected; 2. the limitations on rights and freedoms must be *necessary* to ensure respect for a *general interest* or the *rights and freedoms of others*; 3. in any case, the principle of *proportionality* must be respected. This clause in Article 37 is far more demanding and strict than the clauses contained in certain provisions relating to freedoms inspired by the former constitutional text, which place considerable trust in the legislator to determine the limits of rights and freedoms.[17] *A systematic interpretation should lead to Article 37 being applied to all rights and freedoms, except for the few absolute rights.*

52. One wonders, therefore, whether it would not be sufficient to provide for the application of the general clause in Article 37 to all – non-absolute - rights and freedoms and to include the requirement that any restriction be "prescribed by law", in accordance with the European Convention on Human Rights[18] and Article 52 of the Charter of Fundamental Rights of the European Union, on which the draft is based.[19]

53. The question arises, however, as to whether the word "law" in all these articles of the Luxembourg Constitution has the same meaning as the word "law" in the restriction clauses included in European and international human rights conventions. Whereas in the Luxembourg Constitution the word "law" seems to refer to a legislative act adopted by the legislature (formal law), the word "law" in the treaties refers to any legal norm, no matter who the author, which is sufficiently accessible and predictable in its effects (substantive law). It would be helpful, therefore, if the constitutional writers could clarify the term “law” - possibly in a differentiated manner - at least in the “Commentaire”.

54. Adding the principle of legality of restrictions to fundamental rights, while it would make it possible to dispense with the reference to the law in the provisions on safeguarding the various rights, should not, however, lead to the removal of specific clauses prohibiting restrictions on certain freedoms, such as the prohibition of preventive measures (prior authorisation) in respect of freedom of association and freedom of assembly on private property (Articles 25 and 26).

55. It will also be observed that several articles on public liberties contain a clause referring to the possibility of restricting the exercise of these freedoms for the purposes of "prosecution of offences committed in the exercise of these freedoms". In the Luxembourg Constitution, as

to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

[16] CDL-AD(2009)057, paragraph 45.

[17] See Art. 16 (1), second paragraph; Art. 17; Art. 18 (2); Art. 19; Art. 20; Art. 21; Art. 22, Art. 25; Art. 26; Art. 30; Art. 31; Art. 32; Art. 33; Art. 34; Art. 35; Art. 36. See also the phrase “subject to the prosecution of offences committed in the exercise of these freedoms” in Articles 23 and 24 with regard to the manifestation of opinions, freedom of the press, the freedom to manifest one’s philosophical or religious convictions and to hold any or no religious belief.

[18] See paragraphs 2 of Articles 8 to 11 ECHR.

[19] Report by the Commission on Institutions and Constitutional Review, p. 42.

in the Belgian Constitution, this implies that only punitive measures are allowed while preventive measures are prohibited. This could be more explicit. [20]

Chapter 3 – The Grand Duke

56. Before turning to this chapter, it is worth pointing out that political legitimacy is clearly rooted in the Constitution, from which the powers of the monarch derive. Sovereignty resides not in the monarch but in the nation, with which the people identify. Even though the draft maintains the formal competences of the head of state, it now classifies them as "*attributions*" [functions] rather than "*prérogatives*" [prerogatives]. The national character and the weakening of both the patrimonial and the monarchical character of the state can also be seen in the fact that the Constitution is now the Constitution of Luxembourg, "Grand Duchy" being merely a nominal title, and the legitimacy of power is clearly enshrined in the constitutional text, more so than in the Grand Ducal institution.

57. One of the objectives of the reform is to update the text of the Constitution to reflect the effective reduction in the Grand Duke's powers, which have become largely ceremonial.[21] The Venice Commission welcomes the move by the Luxembourg authorities to harmonise the constitutional text with institutional practice as it enables not only the institutions but also citizens to form a clear understanding of the manner in which powers are distributed.

58. With the exception of Liechtenstein[22] and Monaco,[23] European constitutional monarchies are parliamentary monarchies in which the monarch's powers are largely formal and ceremonial. In its 2009 opinion, the Commission stated: "There is no single model for monarchies in Europe. The constitutional provisions of the countries which have retained monarchies diverge particularly in respect of the specific rights and/or powers which monarchs can (still) exercise, under their Governments' political responsibility. The choice of one of the various possible monarchic models is not open to criticism, provided that such choice is compatible with the principles of democracy and the rule of law."[24] For the monarchical form of government to be in conformity with the principles of democracy and the rule of law, no independent legislative and/or executive power with real impact should be in the sole hands of the monarch, as he is not democratically elected, and not under parliamentary or judicial control.[25]

59. Other European constitutional monarchies seeking to adapt their monarchical form of government to democratic principles have taken one of two approaches.[26] Either the monarch has been excluded from the exercise of public power because it is not from the people that he derives his position. His primary function is symbolic and consists in representing the nation. This is essentially the way things have been viewed in Sweden since the 1974 constitutional reform.[27] Or the powers vested in the monarch in the text of the Constitution are reinterpreted so that the authority vested in the monarch is understood to a large extent as a conferral of

[20] The phrase "subject to the prosecution of offences committed in the exercise of these freedoms" in Articles 23 (freedom of opinion and freedom of the press) and 24 (freedom of thought, belief and religion) would seem to exclude preventive measures.
[21] See Report by the Commission on Institutions and Constitutional Review, p. 3.
[22] See CDL-AD (2002)032, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein.
[23] See CDL-AD(2013)018, Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco.
[24] CDL-AD(2009)057, paragraphs 69-70.
[25] CDL-AD(2013)018, paragraph 27.
[26] CDL-AD(2002)032, paragraphs 11-12.
[27] Constitution, Chapter 1, Articles 3-6. The sole political function of the King is to formally preside over meetings of the parliamentary advisory council on foreign affairs, see Chapter 10, Article 12 of the Constitution.

authority on the Government. The monarch remains the formal head of the executive and enjoys immunity, but his decisions must be countersigned by ministers, who are responsible for them.[28]

60. The draft Constitution of Luxembourg is based on the second model. The Grand Duke remains the head of state and the formal head of the executive, enjoying full immunity,[29] while his decisions are subject to countersignature by the Government which is accountable to Parliament.[30] The shift towards a traditional monistic parliamentary system is linked to the fact that the Grand Duke's powers have, to a fairly large extent, been transferred to the Government. Accordingly, the scope of the head of state's power has been reduced to the executive domain, for which the Government assumes responsibility, and the Grand Duke has lost the prerogatives enabling him to intervene in the exercise of legislative power through the right to initiate legislation. While the removal of the Grand Duke's right of legislative initiative and the rule requiring him to exercise executive power jointly with the Government (Article 47) would seem to merely enshrine a pre-existing state of affairs in law, the institutional balance of the regime has nevertheless been altered.

61. Under the current Constitution, the Grand Duke has three functions: a symbolic function as head of state, a function as guarantor of the institutions[31] and an executive function as arbitrator, through his moral influence and his ability to appoint the Prime Minister.[32] The new version retains the symbolic (Article 46) and executive (Article 47) functions, while at the same time specifying that “the Government shall direct the general policy of the state” (Article 86). The actual role of the Grand Duke in executive matters is much more limited, therefore, than the text of Article 47, which deals with the joint exercise of executive authority, might suggest. That much is apparent from other provisions of the Constitution, including notably Chapter 3. Article 47 could be revised accordingly. It should be noted, however, that the same system obtains in the Netherlands[33] and in Belgium.[34]

62. The terminology used in the draft is in line with its content, regularly employing the term "head of state" rather than the hereditary title, except in the part on dynasty (Chapter 3 section 2).

63. The head of state no longer participates, therefore, in the exercise of legislative power, and merely promulgates laws.[35] While he has the power to dissolve the Chamber of Deputies, he may do so only in very specific circumstances (rejection of a motion of confidence, adoption of a motion of censure or resignation of the Government with the assent of the Chamber of Deputies).[36]

[28] Such is the case in Belgium, Denmark, the Netherlands and Norway. In the United Kingdom, too, the powers formally vested in the monarch under an unwritten constitution are exercised, by convention, on the advice of the Government, which exercises them in practice.

[29] Article 46 of the draft; see Article 33 of the Constitution.
[30] Article 48 of the draft; see Article 45 of the Constitution.
[31] See Article 33.
[32] CDL(2009)131, Proposition de révision portant modification et nouvel ordonnancement de la Constitution du Luxembourg, p. 35.
[33] Article 42.1 of the Constitution: The Government shall comprise the King and the Ministers. 2. The King shall be inviolable, and the ministers shall be responsible.
[34] Based on customary law.
[35] Articles 75 and 76 (5).
[36] Article 73.

64. While Article 87 of the draft provides that the head of state is to appoint the Prime Minister and members of the Government, he is already limited, under current law, to appointing a *formateur*.[37]

65. The head of state no longer appoints judges in a (formally) autonomous manner, but does so on a proposal from the National Council of Justice.[38] He has also lost his military powers to Parliament (see Chapter 8). The power to dissolve municipal councils in the interests of the management of the municipality has been transferred to the Government.[39] The Grand Duke is to retain the power to negotiate treaties, adopt law enforcement measures, grant pardons and confer Orders.

66. Under the Luxembourg system, none of the monarch's powers is exercised without the countersignature of a member of the Government, who bears responsibility for the decisions in question (Article 48). This is in line with the tradition of other European monarchies, such as Belgium, Denmark, Norway, the Netherlands and the United Kingdom. As regards appointing the Prime Minister, there may be situations in which this could be accomplished without a countersignature, but countersignature by the new or former Prime Minister is the most common arrangement. The Government thus appointed will, in any event, and within a very short period of time, have to ensure that it commands a majority in Parliament, as the appointment only becomes final after Parliament has voted on it.

67. The draft therefore establishes that the powers of the head of state are largely formal and that he has little influence over the policy decisions taken by the Government and Parliament, thereby ensuring respect for democratic principles and the rule of law. That is why the “Commentaire” refers to "related competences".[40] It should be noted, however, that, above and beyond the texts (old or new), the democratic nature of the state is also guaranteed by the monarch's own restraint in the exercise of the powers that remain to him.

68. With regard to the **status of the Grand Duke**, the vesting of the power to exercise sovereignty in Parliament can also be seen in the fact that the Grand Duke takes office only after swearing the constitutional oath before the Chamber of Deputies. This oath conditions access to the throne, which implies that hereditary status is not sufficient, with the Government acting as head of state in the interim. The Chamber of Deputies, furthermore, may intervene in the succession whenever exceptional circumstances so require (Article 55). The Chamber of Deputies also settles the question of a possible change of dynasty in the event that the ruling dynasty should become extinct (Article 56). The regency is no longer governed by a family pact but by the Chamber of Deputies (Article 57).

69. The *possibility for the Chamber of Deputies to dismiss the Grand Duke* in the event that he should refuse to perform his duties in accordance with the Constitution (Article 59 talks about the Grand Duke being deemed to have abdicated) could have a considerable impact, for example if the Grand Duke refused to promulgate a law that had been passed (one thinks of the Belgian example, where the King was temporarily declared incapable of reigning). Such a situation, incidentally, led to the amendment of 12 March 2009, stripping the Grand Duke of his power of “sanction” after he refused to sign a law adopted by Parliament on the "right to die with dignity". The Commission had noted, in its interim opinion: "*With admirable statesmanship, the Grand Duke himself requested the abolition of his competence to approve the law in order to prevent the recurrence of any similar deadlock in the future*.” [41] Under this procedure, the monarch is subject to a sui generis system of accountability similar to the one

[37] Report by the Commission on Institutions and Constitutional Review, pp. 52-53.
[38] Article 102.
[39] Article 125, second paragraph.
[40] Report by the Commission on Institutions and Constitutional Review, p. 33.
[41] CDL-AD(2009)057, paragraph 8.

established by the French Constitution in its Article 68 adopted in 2007 (breach of duties incompatible with continuing in office).

70. Article 50 (4) (which corresponds to Article 32 (4) introduced into the Constitution in 2017) allows the head of state to adopt regulatory measures in all matters in the event of a state of emergency (with the countersignature of a member of the Government). The implementation of this procedure is subject to the Chamber of Deputies being unable to legislate within the appropriate time-limits. Beyond 10 days, the backing of at least two thirds of the members of the Chamber of Deputies is required. The maximum duration of a state of emergency is three months. As recommended in the 2009 opinion,[42] major procedural safeguards have been put in place. This provision could be problematic, however, if Parliament were unable to meet within the time allowed or if the situation in question persisted for more than three months. The Luxembourg authorities have indicated that in this last event, a new state of emergency could be declared.

71. The wording of Article 50 (4) is fairly general and encompasses the various crisis scenarios that might arise in the country (international crisis, threats to the vital interests of the population, serious breaches of public security). The last two categories imply a threat of some seriousness to something specific; the term "international crisis", on the other hand, is very broad, and does not make clear precisely what interest is at stake. It therefore needs to be defined.

The fact that early elections cannot be called during a crisis is to be welcomed (Article 73, third paragraph).

72. Article 50 (4), third paragraph, provides that "All regulations adopted pursuant to this provision shall cease to have effect at the end of the state of crisis at the latest." The question arises as to whether it should not be possible for the Chamber of Deputies to confirm regulations adopted by the Grand Duke, so that they can remain in force after the crisis has ended.

73. As regards the *property of the Grand Ducal household*, it will be observed that the Grand Duke's powers in this area have been curtailed and, at the same time, steps taken to protect the institution (*fidéicommis*). The management of the private fortune that the Grand Ducal household places at the disposal of the holder of the throne is deemed to be in the public interest. There has thus been an extension of the public nature of the Grand Ducal family's property. Financially, the interest of the state is enhanced by the fact that if the head of state has an administration managing the assets in question, such management is to be exercised in the public interest and not – it is implied - in the interest of the sovereign.

74. With regard to the rules on *succession and vacancy of the Throne* (Article 55 et seq.), the fact that the rules on succession and vacancy of the Throne no longer derive from a private act, the 1783 Nassau Family Pact, but rather are enshrined in the Constitution likewise reflects the shift in the basis of the legitimacy of power and represents an intervention by parliament in the succession. The Chamber of Deputies, moreover, appoints the regent on a proposal from the Government in the event that the head of state should be incapacitated. The original institution of Lieutenant-Representative of the Grand Duke (Article 61) helps to ensure a smooth transition. One also wonders whether Article 58 should not specify when and how the regency is to be terminated.

75. Wisely, the rules of succession prioritise marriage over any other form of union or adoption. These rules are justified by the very existence of the monarchical principle based

[42] CDL-AD(2009)057, paragraph 84.

on blood ties, and which, by its very nature, must give institutional principles precedence over principles relating to individual rights and freedoms.

Chapter 4 – The Chamber of Deputies

76. With regard to the powers of the Chamber of Deputies, the most substantial changes relate to the right of legislative initiative and commissions of inquiry. 125 voters may table a substantiated motion, which must be supported by 12 500 voters. If these conditions are met, the Chamber of Deputies must take a position on the motion (Article 77).

77. A commission of inquiry must be appointed when a third of deputies so request (Article 79). Parliamentary supervision of the Government and the executive is one of Parliament's key functions.[43] The possibility of convening a commission of inquiry enhances the rights of the opposition and forms part of the development of the oversight function of modern parliaments. It may be considered, however, that the role of Parliament in this sphere is not sufficiently defined. As noted by the Venice Commission in the opinion cited above, "this provision might appear fairly modest in the light of modern developments in constitutional law, especially since the declining role of parliaments in the 21st century would rather necessitate stepping up the supervisory mechanisms available to Parliament".[44] This applies to all parliamentary oversight mechanisms, although, besides commissions of inquiry, these only comprise petitions (Article 80). It may be advisable therefore to add some clarification in the Constitution as to the powers of parliamentary commissions of inquiry so as to guarantee that their rights cannot be abolished by an ordinary law passed by a parliamentary majority. Effective supervisory power would require a commission of inquiry to be able to demand information and summon people to hearings.[45]

78. As to the functioning of the Chamber of Deputies, the first question to be addressed is the *apportionment of powers between constitutional writers, legislators and Parliament as regards the rules on the functioning of Parliament.* The Constitution (Article 66) has relatively little to say about the matter of the incompatibilities arising from a combination of political rules and rules on the exercise of individual rights. Questions might also be raised about the fact that the Constitution assigns the internal rules of the Chamber of Deputies the power to decide on the possibility of allowing a period of reflection between the tabling of and vote on a censure motion.[46]

79. Article 72, 4th paragraph, makes express provision for resolutions adopted by a qualified majority, which equates to two-thirds of the deputies' votes. As clarified by the Luxembourg authorities, a "resolution" is any "act of Parliament", and the majority required is two-thirds of the members of Parliament (whether or not they take part in the vote). At all events, it would be advisable to extend the possibility of introducing legislation adopted by qualified majority – which is to say the intermediate legislation lying between the Constitution and ordinary law (see paragraph 19 above).

80. The decision to systematically convene a public sitting of the Chamber on the third Tuesday following elections is a welcome one.[47]

81. Article 57 of the current Constitution provides that the Chamber of Deputies is the judge of its own election. The Code of Good Conduct in Electoral Matters calls for a final appeal to a court to be possible,[48] and the case-law of the European Court of Human Rights tends to consider that

[43] Report on the role of the opposition in a democratic parliament, CDL-AD(2010)025, paragraph 116.
[44] CDL-AD(2009)057, paragraph 96.
[45] However, there is no common European tradition for this, CDL-AD(2010)025, paragraph 124.
[46] Cf. Report of the Commission on Institutions and Constitutional Review, p. 50.
[47] CDL-AD(2009)057, paragraph 92.
[48] See Code of Good Practice in Electoral Matters, II.3.3.a; Explanatory Report, paragraph 94.

Articles 13 of the ECHR and 3 of the first Protocol entail such a requirement.[49] Consequently, the introduction of a right to appeal to the Constitutional Court on such matters (Article 68(3)) is a welcome development.

82. Under Article 74 of the draft revision – and Article 80 of the Constitution – the Chamber of Deputies may demand the presence of members of Government. As already stated in the interim opinion, this provision could be "supplemented by the provision that the members of the Chamber of Deputies are entitled to receive from them the information requested as a vital instrument of parliamentary control".[50] "Accountability implies both answerability (the obligation to provide information, explanation and justification by the Government and the corresponding right of Parliament to ask for accountability) and enforcement (the capacity to hold those who are responsible to account for their actions)".[51] A provision requiring the Government to provide information to the Chamber of Deputies could be limited to certain requests for information,[52] or entail a general obligation for the Government to inform the Chamber of Deputies about matters submitted to it.[53]

83. The fact that it is impossible to deploy Luxembourg forces abroad without the authorisation of Parliament (Article 81) might pose a problem in theory in the event of a crisis, for example if another country began hostilities. Constitutions should make provision for such serious circumstances, however implausible they may seem. In the event of a crisis requiring an urgent decision, it might be preferable to be able to ratify deployment as soon as possible.[54]

84. As to the question of dissolving the Chamber of Deputies (Article 73), besides the fact that this power is no longer exercised by the Grand Duke, the term dissolution is not employed; the draft revision refers instead to early elections. Early elections may – but need not – be held in three circumstances: a vote of no confidence in the Government, a censure motion against it or the resignation of the Government. The decision not to leave the possibility of calling early elections to the Government's discretion is entirely acceptable in the light of the relevant international standards. It may be worth clarifying, however, whether early elections imply that the Chamber will be dissolved or that it will continue to operate until the new Chamber is installed. There may also be a risk, if the Government resigns, that the Chamber refuses to call early elections.

85. With regard to *legislative initiative*, Article 75 of the draft revision abandons the now outmoded principle that the Grand Duke is the prime legislator, and recognises the legislative initiative of both the Government and each individual deputy.

86. On the other hand, the Grand Duke's power of promulgation has been preserved (Article 76(5); Article 34 of the Constitution). In general, monarchies which retain the monarch's power of promulgation are those which – unlike Luxembourg – have also preserved their power

[49] See ECHR *Grosaru v. Romania*, 78039/01, 2 March 2010, particularly §§ 55-62.
[50] CDL-AD(2009)057, paragraph 104.
[51] CDL-AD(2013)018, paragraph 23.
[52] See, for example, Article 68 of the Constitution of the Netherlands: "Ministers and State Secretaries shall provide, orally or in writing, the Houses either separately or in joint session with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State."
[53] See Article 82 of the Constitution of Norway: "The Government is to provide the Storting with all information that is necessary for the proceedings on the matters it submits. No Member of the Council of State may submit incorrect or misleading information to the Storting or its bodies."
[54] See Article 19.2 of the Danish Constitution: "Except for purposes of defence against an armed attack upon the Realm or Danish forces, the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall forthwith be submitted to the Folketing. If the Folketing is not in session it shall be convened immediately."

of sanction.[55] In Sweden by contrast, laws are promulgated by the Government, or by Parliament where the laws concern it directly.[56]

87. It should be stressed, however, that promulgation "is a formal act which attests the existence of the law, authenticates the text of the latter, confirms that the rules governing the adoption of the law were observed and makes the law enforceable". Since deciding whether this power should lie with the Government or the Grand Duke "is a question of expediency, it is for the Luxembourg constitutional writers to decide".[57]

88. Article 53 of the current Constitution denies persons serving long prison sentences and adults under guardianship the right to vote and to stand in elections, and provides that persons convicted of less serious offences may also have such rights withdrawn in court. The European Court of Human Rights has, on several occasions, ruled out the possibility of withdrawing the right to vote from persons who have received certain sentences. The Venice Commission must highlight the conflict in this area between Luxembourg legislation and the case-law of the Court.[58] The proposed text (Article 65) refers to the law, which is acceptable provided that restrictions to the right to vote are in keeping with the criteria established by the case-law of the Court.

89. Compulsory voting is provided for in law although, in practice, it has not been enforced for a long time. There is good reason to question whether such a requirement is acceptable when the Constitution says nothing about. It would be preferable therefore either for the Constitution to provide that voting is compulsory or for the requirement to be done away with altogether.

The role of referendums

90. The form of democracy deriving from the Luxembourg Constitution is mostly representative and more specifically parliamentary (Article 2) as referendums are consultative (save, it would seem, for the adoption of the Constitution, although only after a parliamentary vote).

91. Referendums are regarded as exceptional procedures (Article 78). Above all, a referendum may only be called after the adoption of a special law establishing the arrangements for the procedure and the effects thereof. *It would be desirable for the Constitution to deal, at least in broad terms, with both the effects of and the arrangements for referendums. Likewise, the failure of the constitution to establish the composition of the electorate for referendums could be called into question.*

92. Rules are laid down for constitutional referendums, which may be held only after a parliamentary vote and may replace a second vote if so requested by a quarter of the deputies or by 25 000 voters (Article 127).

The Ombudsman

93. Article 82 incorporates the institution of Ombudsman, which was established at statutory level in 2002.[59] The article describes the procedure for the appointment of the Ombudsman, who is "appointed by the head of state on the proposal of the Chamber of Deputies". It leaves it to the (ordinary) law to establish "the functions and the operating rules of the Ombudsman and his/her

[55] Articles 74 and 109 of the Belgian Constitution; Articles 21 and 22 of the Danish Constitution; Articles 82 and 87 of the Dutch Constitution and Articles 76 and 78 of the Norwegian Constitution.
[56] Constitution, Chapter 8, Article 19.
[57] CDL-AD(2009)057, paragraph 95.
[58] See for example, *Hirst v. the United Kingdom (No. 2)*, 74025/01, 6 October 2005; *Alajos Kiss v. Hungary*, 38832/06, 20 May 2010.
[59] The Venice Commission was asked to give its opinion on the bill on the establishment of an Ombudsman: see CDL-AD(2002)022, Opinion on draft Law No. 4832 on the establishment of an Ombudsman in Luxembourg.

relations with the Chamber of Deputies". In this context the Venice Commission refers to its own "Venice Principles" on the protection and promotion of the Ombudsman institution.[60] Under principle 2, "the Ombudsman Institution, including its mandate, shall be based on a firm legal foundation, preferably at constitutional level, while its characteristics and functions may be further elaborated at the statutory level", which is what the draft constitutional revision does. The Commission also refers, however, to principle 6, under which "the Ombudsman shall be elected or appointed according to procedures strengthening to the highest possible extent the authority, impartiality, independence and legitimacy of the Institution. The Ombudsman shall preferably be elected by Parliament by an appropriate qualified majority". Yet to comply with this principle, Article 82 should specify that the proposal by the Chamber of Deputies must be adopted by a qualified majority, as described in Article 72, 3rd paragraph. The length of the Ombudsman's term of office should also be laid down in the Constitution. The Venice Commission has expressed the view that "the term of office of the Ombudsman shall be longer than the mandate of the appointing body. The term of office shall preferably be limited to a single term, with no option for re-election; at any rate, the Ombudsman's mandate shall be renewable only once. The single term shall preferably not be stipulated below seven years" (principle 10).

Chapter 5 – The Government

94. *The choice made combines a collegiate view of Government with a more individualistic one.* Therefore the Government's responsibility is deemed to be collegiate but the draft revision does not rule out the individual responsibility of ministers for matters falling within their remit.

95. In particular, the draft continues to provide, at least formally, that ministers are appointed by the head of state rather than the Prime Minister (Article 87, 2nd paragraph). As already noted in the opinion of 2009, it would be preferable to assign the Prime Minister a role in appointing members of the Government and especially in terminating their periods of office,[61] and to adapt the text to that actual practice, which assigns the head of state only a "purely formal" role in the matter and does so only "in principle".[62] This matches the rules in other European monarchies,[63] although they do make the Prime Minister's role clearer. In the Netherlands, for example, the Constitution expressly states that the nomination of Government members must be countersigned by the Prime Minister.[64] Another solution, which is found in many European constitutions, is for the Prime Minister to be appointed directly as the head of Government and for the other ministers to be appointed on the Prime Minister's proposal.[65] The third model is that of Sweden, where the Prime Minister is proposed by the Speaker of the Parliament and approved by the Parliament and then he/she appoints the Government.[66]

96. *With regard to the responsibility of the Government* and its members, it should be noted that the parliamentary system originated in the transfer of the criminal responsibility of the members of the Government to a political responsibility before Parliament, and the draft takes this change into account. As the Venice Commission has emphasised, "the ability of a national constitutional system to separate and distinguish political and criminal responsibility for

[60] CDL(2019)008 - adoption planned for March 2019.
[61] CDL-AD(2009)057, paragraph 98.
[62] Report of the Commission on Institutions and Constitutional Review, p. 23.
[63] Article 14 of the Danish Constitution; Article 12 of the Norwegian Constitution; Article 43 of the Dutch Constitution; Article 96 of the Belgian Constitution.
[64] Article 48 of the Constitution. In Denmark, the countersignature of the newly appointed prime Minister is not expressly required by the Constitution but follows from an established interpretation – see Jens Peter Christensen, Jørgen Albæk Hansen and Michael Hansen Jensen, *Dansk Statsret,* 2nd edition, Copenhagen 2016, p. 65. In Norway, the established interpretation is that the outgoing Prime Minister must countersign the appointment of any new Government by the King, see Arne Fliflet, *Grunnloven med kommentarer,* Oslo 2005, pp. 116 and 117.
[65] See, for example, Article 92 of the Italian Constitution.
[66] Chapter 6, Articles 1 and 4-6 of the Swedish Constitution.

government ministers (past and present) is a sign of the level of democratic well-functioning and maturity as well as the respect for the rule of law. Criminal proceedings should not be used to penalise political mistakes and disagreements. Political actions by ministers should be subject to procedures for political responsibility. Criminal procedures should be reserved for criminal acts".[67] The distinction between what is an ordinary law offence on the one hand and a political decision on the other depends to a great extent on the foreseeability and hence the clarity of the applicable criminal provisions.[68]

97. Leaving it to the law to determine which court has jurisdiction to hear cases relating to the separation of powers (Article 90(3)) is a debatable approach. There are two main models in European constitutional law where it comes to the criminal responsibility of ministers, namely use of the ordinary courts or special impeachment procedures. In the absence of a definition of special impeachment procedures in the Constitution, the criminal responsibility of Government members is mostly incurred under the ordinary law, and hence before the ordinary courts, and criminal prosecution is reserved for the public prosecutor.[69]

98. As to political responsibility, the fact that the Government derives its legitimacy from Parliament and not from the head of state is also reflected in Article 89, which provides that all newly formed Governments must hold a vote to confirm the confidence of the Chamber. The Prime Minister may also decide to organise a vote of confidence in his/her Government, having discussed the matter with the Cabinet.

Chapter 6 – The Council of State

99. Article 91 describes the powers of the Council of State in some detail. In particular, it has only an advisory role on laws and regulations. Article 92, on the other hand, leaves it to the law to determine how it will be organised and how it will perform its functions. The law of 2017 on the organisation of the Council of State provides an example of what an "organic" law governing an institution playing a part in the legislative process such as the Council of State might consist of. It might also be possible for the Constitution to determine how it is to be appointed and composed and what are the requirements to be a member.

Chapter 7 – Justice

100. The organisation of the Luxembourg justice system is somewhat complex as it includes several special courts, which are the result of historical developments. This does not pose any problem with regard to the principles of the rule of law.

101. Several new features have been incorporated into this chapter. For the first time, the Constitution refers specifically to "judicial authority": see Article 93, which also confirms the existence of two bodies of members of the judiciary, namely that of judges and that of public prosecutors. The independence of both is enshrined in the Constitution but the judges enjoy what might be called an individual form of independence whereas that of the prosecutors is collective (Article 99(2)). It is clear from this provision and the fact that public prosecutors do not have security of tenure that the state prosecution service is entirely subject to hierarchical rules, making this a "French-style" system. The Venice Commission considers it acceptable for

[67] CDL-AD(2013)001, Report on the relationship between political and criminal ministerial responsibility, paragraphs 105-106.
[68] See, in particular, CDL-AD(2013)001, paragraphs 99 et seq. and 112-115, concerning offences such as "abuse of office" and "misuse of powers".
[69] Report of the Commission on Institutions and Constitutional Review, p. 55.

prosecutors to be appointed by a higher authority, but recommends that they should be appointed up to their retirement.[70]

102. Articles 93 to 96 describe in detail how cases are divided up between courts.

103. Article 98 reiterates the principle of the hierarchy of rules. As stated above (paragraph 18), it is recommended to refer expressly in the Constitution to the pre-eminence of international law over all domestic law, which is recognised in Luxembourg.

104. As a whole, the chapter gives a briefer but more accurate description than before of the Luxembourg judicial system. It should be noted that two controversial proposals, namely the plans for a "jurisdiction disputes court" and a "supreme court", have now been dropped. Yet, the former Article 95 provided for the intervention of the Superior Court of Justice to settle jurisdiction disputes. It would be interesting to know what mechanism it is intended to put in place to settle any such conflicts in future.

105. It would also be desirable for the Constitution to include at least a basic description of the procedure for the appointment of judges and prosecutors, in accordance with international standards on the independence of the judicial system[71] – unless such rules were included in organic laws, a measure that is not yet planned. The draft revision does state that "judges and prosecutors shall be appointed by the head of state on the proposal of the National Judicial Council" and that "judges shall be irremovable" (Article 100(2)), but it would be desirable for the Constitution to provide more detail, including with regard to the possibility of terminating the office of judges, particularly in the event of breaches of their obligations within the meaning of Article 100(3), and the body with jurisdiction in such matters.

106. Article 106 for its part is the response to a previous remark by the Venice Commission:[72] It emphasises the need for impartiality of judges in accordance with Article 6 of the ECHR as interpreted by the European Court of Human Rights.

107. Article 102 sets up the National Judicial Council, which is granted the power to propose persons to be appointed as judges or prosecutors and must be made up mostly of judges and prosecutors itself. Further to the preparatory discussions, the text opts for a traditional configuration in Europe, in which the head of state appoints judges and prosecutors on a proposal by a collegiate body representing the judiciary. The duties of the National Judicial Council are very broad-ranging. It must ensure that the justice system functions properly and respect the independence of the judiciary – which is more of a constitutional requirement than a duty. It would be preferable for the National Judicial Council to be charged with "guaranteeing" the independence of the judiciary. Its functions will be fixed by a law. Here again more details would be desirable, not to say essential. The Constitution should lay down the rules on the composition and the main functions of the National Judicial Council. As the Venice Commission has noted on many occasions, to avoid any accusations of corporatism, it is important for judicial councils to involve persons from outside the judiciary in their work.[73] With regard to membership, the Venice Commission recommends that a substantial number if not the majority of members of a judicial council should be judges and prosecutors. Article 102 stipulates that the Council should be made up for the most part by judges and prosecutors. Under the bill on this body currently being debated in the Chamber of Deputies, it will be made up of 9 members, 6 or two-thirds of whom

[70] Report on the independence of the judicial system – Part II Prosecutors (CDL-AD(2010)040), paragraphs 38-40; Rule of Law Checklist (CDL-AD(2016)007), II.E.1.d.

[71] Report on the independence of the judicial system – Part I The independence of judges (CDL-AD(2010)040) and Rule of Law Checklist (CDL-AD(2016)007), II.E.1.a-b.

[72] CDL-AD(2009)057, paragraph 105.

[73] CDL-AD(2018)017, paragraph 138; CDL-AD(2014)010, paragraph 188, and citations; CDL-AD(2010)040, paragraph 65.

should be judges and prosecutors, who will be joined by a member of the bar, a university academic and a representative of civil society, the two latter persons being appointed by the Chamber of Deputies. The Venice Commission would point out in this respect that "the non-judicial component of a judicial council is crucial for the efficient exercise of the disciplinary powers of the council" and that too high a proportion of judges (11 out of 15 in the case cited or, as in Luxembourg, two-thirds of the members) "could lead to inefficient disciplinary procedures".[74] It recommends therefore that a lower number of judges should sit on the future National Judicial Council. Under Article 8§2 of the draft law, two members of the Council – a civil society representative and an academic – will be appointed by a two-thirds majority of the Chamber of Deputies. While it should be welcomed that a qualified majority is required, it would seem necessary to include this in the Constitution, in accordance with Article 72, 2nd and 3rd paragraphs.

108. It would also be worth specifying whether the powers of the National Judicial Council are identical for judges and prosecutors.

109. Admittedly, including the Constitutional Court in the chapter on justice is appropriate, especially as it is made up of judges from other courts (Article 103(3)). However, as it is an independent body with separate functions, namely to rule on the compliance of laws with the Constitution, it could also be the subject of a separate chapter.

110. The Constitutional Court is still made up of the President of the Superior Court of Justice, the President of the Administrative Court, two judges at the Court of Cassation and five judges appointed by the Government – which now officially replaces the Grand Duke in this role – on the joint advice of the Superior Court of Justice and the Administrative Court (Article 103(3)).

111. Article 103(4) provides for the possibility of appointing substitutes for the judges in the Constitutional Court. During the visit, the delegation was informed that the presence of substitutes proved essential when the Court was called on to rule on cases which some of its members were involved in in their other functions. However, more detailed information on cases in which substitutes are called in to complete the Court membership and the procedure to be applied in such cases would be welcome.

112. The current provisions on the functions of the Constitutional Court are in line with the traditional practice in French-speaking countries, which does not provide for direct appeals to the Constitutional Court. Article 103 preserves the current functions of the Court, which are those of a body exercising retrospective judicial review of laws – with the exception of those approving treaties – at the request of a court. It has also been assigned a new function: the new Article 68(3) entrusts it with examining appeals concerning the validation of elections and against disqualification decisions (on grounds of ineligibility) or findings of incompatibility arrived at by the Chamber of Deputies.

113. In view of the requirement for the ordinary courts to apply international human rights standards, which often go further than both the current text of the Constitution and the draft revision, the relative unwieldiness of the procedure to refer cases to it, and the uncertainty as to the legal effects of its judgments, the role of this Court is still somewhat limited. Its role therefore should be consolidated.

114. The new paragraph 6, which deals with the effects of Constitutional Court judgments, is a step in the right direction. There is no clarification on this point in the current text, or moreover any other text. The new text states that provisions declared to be unconstitutional "shall cease to

[74] CDL-AD(2013)034, Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of judges of Ukraine, paragraph 41. See also CDL-AD(2014)026, Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the Judicial Council, the competence of the Constitutional Court and special financial zones, paragraphs 74-76.

have any legal effect" on the day after publication of the judgment. This is a real transformation in the functions of the Court, which *it would be worth clarifying.* According to information provided by the Luxembourg authorities, the law becomes impossible to apply, but this does not mean that it disappears completely from the body of law, as it is not an annulment. The Venice Commission recommends that, in order to guarantee the principle of legal certainty, provision should be made for provisions that are declared unconstitutional to be annulled.[75]

115. The new paragraph also introduces the possibility of deferring the effect of a judgment of the Court for a period of no more than twelve months. Now that the Court's judgments are considered to apply *erga omnes*, this possibility is welcome, not to say essential. Otherwise, and failing the formal repeal of the provision declared unconstitutional, it would have to be specified whether judgments of the Constitutional Court had an *ex nunc* or an *ex tunc* effect, together with a stipulation that the law should not be applied to the applicant.

Chapter 8 – Provisions on State administration

116. Article 116 takes up the three principles laid down in the agreement of 2015 between the state and the religious communities, namely separation of the churches and religious communities on the one hand and the state on the other, reliance on the law to lay down rules on the relationship between them, and the possibility of specific agreements in the forms provided for by the law and subject to the approval of the Chamber of Deputies.

117. The agreement of 2015 made it possible to introduce this major innovation without the question of the funding of ministers of religion being put in the referendum of 7 June 2015, as had been planned previously.[76]

118. In this way the Constitution remains (probably wisely) at a sufficiently general level to guarantee the neutrality of the state. On the other hand, specific agreements will have to be adopted to deal with subjects that have proved particularly sensitive such as the remuneration of ministers of religion.

119. The question could also be raised as to why Article 116 on the relations between the state and religious communities forms part of the chapter containing provisions on the administration of the state. A more appropriate place for this provision would be the chapters relating to fundamental aspects of the definition of the state, which also includes its religious neutrality. The possibility could also be considered of mentioning the state and the church in the part of the Constitution which deals with freedom of religion.

Chapter 9 – Public state establishments and professional bodies

120. Luxembourg recognises the legal personality of public establishments, professional bodies, and bodies representing the liberal professions, whose purpose, organisation and functions must be prescribed by law.

121. The new feature here is the three clarifications made by the new Article 118 with regard to regulatory powers. As these bodies are governed by the principle of speciality, regulatory powers may be delegated to them, albeit only by statute. Such powers are also subject to the principle of the hierarchy of rules (delegated power/regulatory power of the executive/law) and may therefore be the subject of disputes in this connection. These clarifications are welcome.

[75] CDL-AD(2018)028, Malta - Opinion on constitutional arrangements and separation of powers and the independence of the judiciary and law enforcement, paragraphs 74 et seq.
[76] Report of the Commission on Institutions and Constitutional Review, p. 24.

Chapter 10 – Municipalities

122. Article 121, which deals with the financial autonomy of municipalities, seems to provide for two types of fiscal resources: firstly, those collected by the state and allocated to the municipalities (Article 121(1), 1st sentence, and 121(3)) and secondly those introduced and collected by the municipalities themselves (Article 121(1), 2nd sentence). However, this could be clarified.[77]

123. It is worth considering whether it might not be appropriate to provide expressly for a constitutional right to municipal autonomy, as is the case in certain other member states.[78]

124. Luxembourg is a party to the European Charter of Local Self-Government,[79] which works towards this goal by providing that "the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution" (Article 2) and that a judicial remedy must be available if this principle is breached (Article 11). Other key aspects of this Charter could be included in the Constitution, such as the right of local authorities to sufficient resources of their own.[80] Furthermore, Article 125 of the draft revision provides for the possibility of setting aside decisions by the municipal authorities not only in the event of illegality but also where they are contrary to the general interest, and this may, in some cases, be in breach of Article 8 of the Charter, under which "any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles". Article 125, 2nd paragraph, which states only that the Government is entitled to "dissolve municipal councils in the interest of the management of the municipality", requires clarification.

125. It would also be desirable to stipulate in the Constitution which body exercises supervisory powers.

Conclusion

126. The text submitted to the Venice Commission for its opinion complies in general with the fundamental values of the Council of Europe, as expressed for example in the preambles to the Statute of the Council of Europe and the European Convention on Human Rights, namely democracy, the rule of law and fundamental rights. In this connection, account needs to be taken of the practice of the Luxembourg authorities, which gives precedence to international law, including human rights treaties, over domestic law.

127. The draft revision retains the structure of the current Constitution without fundamentally changing the functioning of the institutions or their relationships. In particular, it adjusts the legal powers of the head of state (the Grand Duke) to bring them into line with the functioning of a democratic constitutional monarchy, basing state authority on the sovereignty of the nation and strengthening the powers of Parliament and the Government. This adjustment mostly corresponds to standard constitutional practice and is to be welcomed. It would be desirable, however, to specify that the Grand Duke contributes to some executive functions rather than granting him – contrary to standard practice – joint executive power.

[77] Report of the Commission on Institutions and Constitutional Review, p. 60.
[78] See, for example, Article 41 of the Belgian Constitution, Article 8 of the Constitution of the Czech Republic and Article 50 of the Swiss Constitution. The draft revision states merely that "municipalities shall form autonomous authorities".
[79] ETS 122.
[80] Article 9.1 of the Charter; Article 121(1), 2nd sentence, of the draft, which provides that "in keeping with their constitutional and legal functions, municipal councils may set up the necessary taxes and duties to fulfil municipal interests", does not go far enough.

128. The draft constitutional revision takes into account a large number of the recommendations made in the Venice Commission's interim opinion of 2009. It adds welcome clarifications to the chapter on fundamental rights, particularly by including a cross-referencing clause on restrictions to these rights. However, this chapter should be updated and clarified still further, as outlined below.

129. The Venice Commission makes the following main recommendations:

- Clarify the rules on human rights and rights and freedoms and, in particular:
  - Review the various categories of rights and freedoms, ruling out all restrictions only in respect of absolute rights, as guaranteed by international law;
  - Include rights which international law considers to be subjective rights in the section on "Public liberties" not that on "Objectives with constitutional status";
  - Update the often dated terminology in the current Constitution, for example by incorporating a requirement for a legal basis in the cross-referencing clause on the restriction of freedoms rather than referring to the law in the specific provisions on the various freedoms;
  - Guarantee the principle of equality in general.

- Include a general provision on the hierarchy of rules or at least explicitly indicate the status of international law.

- Provide more details on the following points:
  - the arrangements for and effects of referendums, and the composition of the electorate expected to take part in them;
  - the means of appointing the Council of State and the National Judicial Council and their composition;
  - the means of appointing and dismissing judges;
  - the length of the term of office of the Ombudsman: specify, in addition, that candidates must be proposed by the Chamber of Deputies by the qualified majority provided for in Article 72(3).

130. Other recommendations can be found in the body of the text. In particular:

- It would be useful to establish a category of "organic law", or alternatively, the Constitution should specify that any law relating to the key aspects of the organisation of the public authorities must be adopted by a qualified majority.

- Further clarification could be given on:
  - the definition of law;
  - the definition of an international crisis;
  - the powers of parliamentary commissions of inquiry;
  - the termination of the regency;
  - the role of the Prime Minister in forming governments;
  - the body with jurisdiction with regard to the criminal responsibility of ministers;
  - the effect of declarations that laws are unconstitutional;
  - the conditions for the dissolution of municipal councils; it will need to be decided which body has supervisory powers over municipalities.

131. In this context, Luxembourg's constitution writers have full discretion to make political choices.

132. The Venice Commission is at the disposal of the Luxembourg authorities to continue co-operating with them on the constitutional revision.